Supreme Court, U. S.
FILED
JUL 15 1975
MICHAEL RODAK, JR., CLERK

No. 74-1413

In the

Supreme Court of the United States

October Term, 1974

WILLIAM T. COLEMAN, JR., SECRETARY OF TRANSPORTATION, ET AL.,

Petitioners

v.

THE CONSERVATION SOCIETY OF SOUTHERN VERMONT, INC., ET AL.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Harvey D. Carter, Jr.
R. Paul Wickes
Haynes N. Johnson
Frederick Pope, Jr.
Robert L. Morris
Attorneys for Respondents
115 Elm Street
Bennington, Vt. 05201

WILLIAMS, WITTEN, CARTER & WICKES
Of Counsel

INDEX

	Page
Opinions below	2
Jurisdiction	2
Questions presented	2
Statute and regulations involved	3
Statement	3
Reasons why writ should be denied	7
Conclusion	15
Appendix A	1a

CITATIONS

Cases:

Aberdeen & Rockfish Railroad v. *SCRAP,* 7 ERC 2009, 43 U.S.L.W. 4844, (U.S. June 24, 1975)	14
Appalachian Mountain Club v. *Brinegar,* D.N.H., Civ. Nos. 74-208, 74-219, decided March 25, 1975	9
Citizens Environmental Council v. *Volpe,* 484 F.2d 870	8
Essex County Preservation Association v. *Campbell,* D.Mass., Civ. No. 74-2680M, decided July 9, 1975	9

Cases--Continued

	Page
Finish Altoona's Interstate Right, Inc. v. *Volpe*, 484 F.2d 638, affirming 355 F. Supp. 933	8
Greene County Planning Board v. *Federal Power Commission*, 455 F.2d 412, certiorari denied, 409 U.S. 849	6, 8
I-291 Why? Association v. *Burns*, ___ F.2d ___, (2nd Cir. 1975), 6 ERC 1275	7, 9
Iowa Citizens for Environmental Quality, Inc. v. *Volpe*, 487 F.2d 849	8
Life of the Land v. *Brinegar*, 485 F.2d 460	8, 9
Movement Against Destruction v. *Volpe*, 500 F.2d 29, affirming 361 F. Supp. 1360	8
Sierra Club v. *Morton*, ____ F.2d ___, (D.C. Cir. 1975), 7 ERC 1768	13, 14
Swain v. *Brinegar*, 7th Cir., Civil No. 74-1625, decided April 29, 1975	7
Udall v. *Tallman*, 380 U.S. 1,16,	13
U.S. v. *SCRAP, 412 U.S. 669*	7

Statutes, regulations, and rules:

	Page
Department of Transportation Act of 1966, Section 4 (f), 49 U.S.C. 1653 (f)	4
Federal Highway Administration Policy and Procedure Memo (PPM 90-1), 37 Fed.Reg. 21809-21816	3, 4, 10, 1a
Federal Rules of Civil Procedure, Rule 52(a)	2
Intergovernmental Cooperation Act of 1968, 42 U.S.C. 4231 (b)	10
National Environmental Policy Act of 1969, 83 Stat. 853, 42 U.S.C. 4332 *et seq.*: Section 102 (2) (c)	*passim*

Statutes, regulations, and rules--Continued

	Page
23 C.F.R. 771.12 (a)	9
40 C.F.R. 1500.7 (c)	1a

Miscellaneous:

	Page
"Memorandum to Federal Agencies on Procedures for Improving Environmental Impact Statements", 3 BNA Environmental Reporter, Current Developments, May 19, 1972 at 82-87	12
Peterson and Kennan, "The Federal Highway Program: Administrative Procedures and Judicial Interpretation", 2 ELR 40001 (1972).	11
Third Annual Report of the Council on Environmental Quality (1972)	12
H.R. Rep. No. 94-111, 94th Cong., 1st Sess. (Parts 1 and 2) (1975)	10
Sen. Rep. No. 94-152, 94th Cong., 2d Sess. (1975)	10

No. 74-1413

In the

Supreme Court of the United States

October Term, 1974

WILLIAM T. COLEMAN, JR., SECRETARY
OF TRANSPORTATION, ET AL.,
Petitioners,

v.

THE CONSERVATION SOCIETY OF SOUTHERN
VERMONT, INC., ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

Opinions Below

The opinions of the district court are reported at 343 F. Supp. 761 (App. B of Petition) [*Conservation Society I*] and 362 F. Supp. 627 (App. C of Petition) [*Conservation Society II*]. The opinion of the Court of Appeals for the Second Circuit is reported at 508 F. 2d 927 (App. A of Petition).

Jurisdiction

The Petition adequately sets forth the jurisdictional requisites.

Questions Presented

1. Whether the district court's finding, as a matter of fact, that an environmental impact statement, prepared by an "inherently biased" state agency and subsequently "rubber stamped" by the responsible federal official, was not the environmental impact statement required to be prepared by the responsible federal official by Section 102 (2)(C) of the National Environmental Policy Act of 1969 is clearly erroneous (Fed.R.Civ.P. 52(a)).

2. Whether the federal "partnership", found by the district court to exist with the states of Connecticut, Massachusetts and Vermont, by and through which the responsible federal official studies, plans, proposes and funds the eventual construction of a superhighway through the three states, requires the responsible federal official to prepare and file an environmental impact statement on the three-state superhighway prior

to construction of one of its segments in Vermont.

Statute and Regulations Involved

The Petition sets forth at pp. 117a-146a the pertinent provisions of the National Environmental Policy Act of 1969 (NEPA), the implementing policy and procedure memorandum of the Federal Highway Administration (PPM 90-1) and the Guidelines of the Council on Environmental Quality (the "guidelines"). Other relevant portions of PPM 90-1 and the guidelines are set out in Appendix A, *infra*.

Statement

United States Route 7 (Route 7) is the principal north-south highway in westernmost New England. Beginning at Norwalk in southern Connecticut, Route 7 wends its way northerly through Connecticut, Massachusetts and Vermont some 280 miles to its northern terminus near the Canadian border at Burlington, Vermont. The three states, with the knowledge and cooperation of the Federal Highway Administration (FHWA), have as their long-range goal the eventual relocation and conversion of existing Route 7 into a divided, limited-access superhighway (App. A of Petition, pps. 3a-4a; App. C of Petition, pps. 63a-64a). Acting in response to an express legislative mandate the Vermont highway department in Spring 1972 began construction of a 20-mile segment of relocated Route 7 between Bennington and Manchester, Vermont. On May 4, 1972 some of the respondents sued the Petitioners and the state

respondents in the United States District Court for the District of Vermont.[1] On October 26, 1972, Honorable James L. Oakes, United States Circuit Judge, sitting by designation, permanently enjoined the segment's construction pending preparation of the environmental impact statement (EIS) required by Section 102(2) (C) of NEPA[2] and Section 4(f) of the Department of Transportation Act of 1966.[3]

Pursuant to its own regulations implementing NEPA (PPM 90-1), (App. F. of Petition, pps. 119a-127a) FHWA delegated preparation of the EIS to the Vermont highway department. After a perfunctory review, "the equivalent of an agency rubber stamp",

---

[1] The respondents include, in addition to plaintiff-appellees below, certain state officials who were defendants at trial. Since these officials have elected not to respond to the Petition, and for the sake of clarity, the term "respondents" hereinafter refers only to plaintiff-appellees below.

[2] NEPA requires at 42 U.S.C. 4332, in part:

> The Congress authorizes and directs that, to the fullest extent possible:
>
> * * *
>
> (2) all Agencies of the Federal Government shall-...(C) include in every recommendation or report on proposals for legislation and other major federal actions significantly affecting the quality of the human environment a detailed statement by the responsible official...

[3] Section 4 (f), 49 U.S.C. 1653 (f), forbids the Secretary of Transportation to approve construction which uses a publicly owned park or recreation area, or wildlife or waterfowl refuge unless he finds there is no feasible and prudent alternative to the use of such land. To date defendants have not complied with this requirement of the district court's order.

the FHWA adopted the highway department's EIS (App. C of the Petition, p. 52a).

On March 20, 1973 the Petitioners and state defendants jointly moved to dissolve the injunction. After hearings and receipt of further evidence, the district court concluded that the EIS, while sufficient to support two-lane construction, was inherently biased in favor of the project because its preparer, the Vermont highway department, was acting under a legislative mandate to construct the road (*id.* at 56a). Moreover, the court said, NEPA requires "...the *federal agency making the decision* [to] consider environmental values, potential alternatives and the overall consequences of the proposed action" (*id.* at 53a) (emphasis not added). Accordingly, the court required "genuine FHWA preparation of an EIS" (*ibid.*).

In addition, the court ordered FHWA to prepare an overall EIS on the entire Route 7 corridor (*id.* at 68a) as a condition to construction of the Vermont segment. Although "there is no overall federal plan for improvement of the Route 7 corridor in the three states" (*id.* at 64a), the court said, "each of the three states' highway departments are looking toward this end as possible of accomplishment with legislative and federal approval over a long-range period of time, with federal approval taking place on an ad hoc basis at the division engineer level" (*ibid.*). Since "construction of isolated sections along the corridor will induce traffic, tending further to require additional construction" (*ibid.*), "an overall EIS for all of Route 7 would have one major consideration in mind, whether a superhighway is environmentally and otherwise the most viable alternative" (*id.* at 67a).

The court of appeals affirmed. Relying principally on *Greene County Planning Board* v. *Federal Power Commission*, 455 F. 2d 412 (2d Cir. 1972), *cert. denied*, 409 U.S. 849 (1972) (*Greene County*), and The Council on Environmental Quality's (CEQ) guidelines the court adopted "a stringent rule requiring FHWA preparation of the EIS" (App. A of Petition, p. 11a). Requiring genuine FHWA preparation not only carries out the explicit mandate of NEPA (*id.* at 8a) but also achieves two highly desirable practical results. First, it eliminates the possibility that state bias will infect the initial federal decision (*id.* at 9a). Second, it will substantially, and perhaps entirely, eliminate the necessity for litigation on the extent of federal participation in the EIS process (*id.* at 10a). Accordingly, the holding effectuates Congressional policy and serves judicial economy.

The court of appeals also did "not disturb the district court's conclusion that an ultimate Route 7 superhighway is the expectation of state agencies with the knowledge and cooperation of the Federal government" (*id.* at 16a). The court noted that "[t]he appropriateness of ordering impact statements for entire development programs when a proposal before an agency covers only one portion of a more massive undertaking is not a novel issue to the courts" (*id.* at 18a). The court then applied NEPA, relevant federal regulations and judicial precedents to the facts as found and concluded that they "appear to afford ample basis for Judge Oakes' determination that a corridor EIS is required" (*id.* at 19a-20a). Moreover, the court of appeals stated, "the district court...did not abuse its discretion in concluding that the time was appropriate

for early, comprehensive and meaningful consideration of the environmental impact of an alternative to continued highway expansion in the Route 7 corridor" (*ibid.*).

Reasons Why the Writ Should Be Denied

1. Federal agencies have "the primary responsibility for the implementation of NEPA". *U.S.* v. *SCRAP*, 412 U.S. 669, 694 (1973). The instant case presents the issue whether a federal agency properly discharges this responsibility when it completely delegates the preparation of an EIS to an inherently biased state agency. In Vermont, the State legislature mandated construction of Route 7. Thus, in the words of the district court, "it is impossible for the [Vermont highway department] not to be an advocate of legislatively mandated construction and still act consistently with its duty as a state agency" (App. C of Petition, p. 50a). The presence of a legislatively mandated agency represents a critical finding of fact upon which the Second Circuit, in large part, posited its decision that "the requisite EIS be prepared by the FHWA, the responsible federal agency" (App. A of Petition, pps. 9a, 12a-13a). Another panel of the Second Circuit has noted that the "standard of primary and non-delegable responsibility" does not necessarily imply "a *per se* rule to the effect that state participation in the preparation of an EIS renders it invalid." *I-291 Why? Association* v. *Burns*, ____F. 2d ____(2nd Cir. 1975), 6 ERC 1275.[4] Thus, while the Fourth, Fifth, Eighth, Ninth and Tenth Circuits have permitted state

[4] But see *Swain* v. *Brinegar*, Civil No. 74-1625 (7th Cir., April 29, 1975).

agencies to prepare impact statements under federal control, such decisions were made in the absence of a finding that the state agencies were inherently biased.[5]

[5]Moreover, four of these circuits have factually distinguished their holdings on the question of preparation from either *Greene County* or *Conservation Society II*.

In *Finish Altoona's Interstate Right* v. *Volpe*, 484 F. 2d 638 (5th Cir. 1973), the district court had found that "the Secretary did not merely rubber stamp the State's work..." 355 F. Supp. 933, 938 (D.Ga. 1973). He "...prepared a detailed report treating various alternatives and suggested specific design measures intended to minimize harm to the environment". *Id.* at 937.

In *Iowa Citizens for Environmental Quality* v. *Volpe*, 487 F. 2d 849 (8th Cir. 1973) *aff'g.* F. Supp. (D. Iowa 1972), 4 ERC 1755, the Eighth Circuit, while relying heavily on compliance with PPM 90-1, did posit its holding, in part, on the district court's finding that "the record is clear that FHWA did not merely rubber stamp the State's work. FHWA recommended changes in the draft statement and supplemented the final EIS by additional information." 4 ERC at 1759.

In an analogous decision involving the Federal Aviation Administration the Ninth Circuit, in approving an applicant's EIS, noted that "unlike *Greene County* and *Conservation Society II* the federal agency involved here did not 'abdicate a significant part of its responsibility' to another organization". *Life of the Land* v. *Brinegar*, 485 F. 2d 460, 468 (9th Cir. 1973).

In *Citizens Environmental Council* v. *Volpe*, 484 F. 2d 870 (10th Cir. 1973), the Tenth Circuit explicitly found that "the Secretary of Transportation did not simply rubber-stamp the State's work". *Id.* at 873.

The remaining circuit, the Fourth, in *Movement Against Destruction* v. *Volpe*, 500 F. 2d 29 (4th Cir. 1973), in a *per curiam* opinion, affirmed "upon the opinion of the district court". *Id.* at 30. The district court did not directly address the issue of preparation, noting in passing only that "the FHWA ...acted with good faith objectivity in reviewing and accepting" the EIS. 361 F. Supp. 1360, 1393 (D. Md. 1973).

In so far as these decisions differ from *Conservation Society II*, they differ only in the degree to which they permit state agency involvement under different facts. When analyzed in light of the Second Circuit's clarifying language in *I-291 Why?, supra*, the differences among the circuits are much narrower than the Petitioners assert.[6]

Accordingly, it is not clear that the Petitioners face the dilemma "of attempting to comply with NEPA only to be told, at a later date, that their understanding of the statute was incorrect and they must start again" (Petition, p. 12). Nor it is clear that the Petitioners are unable to resolve their problem by simple administrative remedy. For example, the step of changing the word "shall" to "may" in the first sentence of 23 CFR part 771.12(a) (App. F of Petition, p. 128a) would permit Petitioners to tailor the degree of their involvement to the facts of each impact statement. When a state agency is inherently biased, *e.g.* it operates pursuant to legislative mandate, then Petitioners may protect NEPA's goals by enforcing the Second Circuit standard.[7] Under other circumstances,

[6]No circuit which has addressed the issue has decided that the *federal* agency is not responsible for the EIS.

[7]A recent decision in the District of Massachusetts applies this very test to an EIS prepared by a consultant with a financial stake in an affirmative federal decision to proceed with a highway project. While rejecting a rigid *per se* rule against delegation, the district court held that "the possibility that a financially interested party may unconsciously stack the deck" requires genuine FHWA preparation of the EIS. *Essex County Preservation Association* v. *Campbell*, Civil No. 74-2680M (D. Mass., July 9, 1975). See also *Appalachian Mountain Club* v. *Brinegar*, Civil Nos. 74-208, 74-219 (D.N.H. March 25, 1975). *Contra, Life of the Land* v. *Brinegar*, 485 F. 2d 460 (9th Cir. 1973).

however, they may delegate a greater share of EIS preparation to the state without jeopardizing either their independent judgment or NEPA's policy goals. To some extent, therefore, Petitioners' inflexibility in their own administrative interpretations of NEPA has created the very uncertainty which they claim this Court must resolve.

Since the date on which Petitioners filed their Petition, both houses of Congress have passed different versions of H.R.3130, a bill which may affect the decision in *Conservation Society II*. This legislation is now in a committee of conference and respondents will advise the Court of any developments which may bear upon the questions presented.

2. Petitioners admit that they "ha[ve] a responsibility to examine, in a timely fashion, the overall effects of a decision to build a highway through a long 'corridor' " (Petition, p. 19). Yet, Petitioners' regulations proscribe such an examination by means of a "program impact statement." PPM 90-1 restricts the preparation of an EIS to "each highway section" (App. F of Petition, p. 119a). A highway section is just that: a segment of highway based on a single location study (App. A, *infra*, p. la). Indeed, Petitioners' argument that no EIS is required "until a state proposes a discrete segment of highway for consideration or construction" is internally inconsistent with their prior position acknowledging their responsibility for "program impact statements". Under the reasoning advanced by Petitioners, Connecticut, Massachusetts and Vermont would have to propose simultaneously literally scores of "highway sections", representing the

entire corridor, in order to have NEPA's requirements attach for the purpose of a corridor impact statement.

Petitioners' assertion that "[a] superhighway through the 'Route 7 corridor' is a gleam in the eye of the planners of the three states" (Petition, p. 21) ignores the district court's findings of fact that the three states, working in "partnership" with federal highway officials, are contemplating or have already constructed an expressway in a number of segments along the Route 7 corridor (App. C of Petition pps. 63a-64a). While it is true that "no overall federal plan for improvement of the Route 7 corridor" exists (*ibid.*), state and federal activity does include, on a piecemeal basis, planned or programed construction in Connecticut and Vermont and proposals for construction in Massachusetts (*ibid.*). At the time of the district court's hearing on Petitioners' motion to dissolve the injunction, the Respondents introduced numerous exhibits showing federal knowledge of, participation in and funding for studies, plans or proposals leading to construction of segments of a superhighway in the Route 7 corridor.[8] In many instances, the states utilized federal planning money (*ibid.*). These facts indicated to the district court and the circuit court that the appropriate time had arrived for the Petitioners to prepare and file an overall EIS for the Route 7 corridor prior to construction of the

---

[8]According to two commentators, the state's planning role is materially affected by the FHWA and subject to the constraints of a close state-federal working relationship. Peterson and Kennan, *The Federal Aid Highway Program: Administrative Procedures and Judicial Interpretation*, 2 ELR 40001 (1972).

Bennington to Manchester segment.[9]

The district court and the circuit court did not make up from whole cloth NEPA's application to these facts. On May 16, 1972 CEQ issued a "Memorandum to Federal Agencies on Procedures for Improving Environmental Impact Statements."[10] Recommendation No. 9 of this Memorandum provided, in part, that:

> ...In many cases broad program statements will be appropriate, assessing the environmental effects of a number of individual actions on a given geographical area, or the overall impact of a large scale program or chain of *contemplated* projects, or the environmental implications of research activities that have reached the stage of investment or commitment to implementation likely to restrict later alternatives. Preparation of program statements in these cases should be in addition to preparation of subsequent statements on major individual actions wherever such actions have significant environmental impacts that were not fully evaluated in a program statement (emphasis added).

[9]The district court based its holding not only on NEPA but also on the Intergovernmental Cooperation Act of 1968, 42 U.S.C. 4231(b) which provides, in pertinent part, that "All viewpoints -- national, regional, state, and local -- shall, to the extent possible, be fully considered and taken into account in planning Federal or Federally-assisted development programs and projects". Since the circuit court felt that NEPA was clearly controlling, it did not review the district court's reliance on the Intergovernmental Cooperation Act. See App. A of Petition p. 20a, n. 44.

[10]Reprinted in 3 BNA Environment Reporter, Current Developments, May 19, 1972, at 82-87. See also CEQ, *Environmental Quality, Third Annual Report*, 233-34 (1972).

Shortly after the district court handed down its decision in *Conservation Society II* on July 27, 1973, CEQ codified this recommendation in its guidelines (see App. A, *infra*, pps. 1a-2a). As Petitioners note, CEQ's interpretation of NEPA is entitled to deference (Petition, p. 16). See also *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965).

Petitioners argue that even if the findings of fact below support the conclusion that a larger project is contemplated, the Bennington to Manchester section should be advanced to construction because it has "independent local utility" (Petition, p. 22). Such a view, however, once again ignores a critical finding of fact below. The district court specifically found "that the construction of isolated sections along the corridor will induce traffic, tending further to require additional construction beyond presently planned termini" (App. C of Petition, p. 68a). The circuit court noted that "Judge Oakes was equally concerned with the irretrievable commitment of federal funds to local highway projects without early attention to possible alternatives to highway development" (App. A of Petition, p. 19a). Accordingly, it affirmed this part of the district court's decision "with a sensitive eye to the options often imperceptibly foreclosed by fragmented growth" (*ibid.*).

The Second Circuit's decision does not conflict with the decisions of five other circuits, as Petitioners maintain (see cases cited in Petition, p. 18).[11] It is true that it stands alone, but only on the basis of its facts. The facts indicate, contrary to Petitioners' assertion,

[11]See also *Sierra Club* v. *Morton*, ___ F. 2d ___ (D.C. Cir. 1975), 7 ERC 1977, 1990, n. 29.

that the district court in ordering the preparation of a corridor EIS, and the court of appeals, in affirming, came to grips directly with the problem of timing. The claim of Petitioners that no major action has been proposed for the entire corridor, or, in the alternative, that such action is so tenuous as to avoid the application of NEPA, conflicts not only with the holding of the district court, affirmed by the circuit court, but also with the interpretation of the District of Columbia Circuit. That court recently distinguished the facts in *Conservation Society II* from the facts in *Sierra Club* v. *Morton*, ____ F 2d ____ (D.C. Cir. 1975), 7 ERC 1977. The District of Columbia Circuit said:

> In *Conservation Society* [*II*] the scope of the proposed action was clear -- the entire 280 mile length of Route 7 -- and irretrievable commitments --the 20-mile segment under construction -- were being made that would determine the course of future action. Thus the proposal was sufficiently ripe to demand preparation of a comprehensive impact statement. *Id.* at 1993, n. 34.

Moreover, the specific findings of the district court detailing federal "partnership" at various levels with the three states' planning process for the superhighway establishes the requisite federal involvement to bring the facts of the instant case within this Court's recent interpretation of federal action in *Aberdeen and Rockfish Railroad* v. *SCRAP*, 43 U.S.L.W. 4844, 4853 (U.S. June 24, 1975).

Had the courts below not required a corridor "program statement" on the basis of the facts in the instant case, in all likelihood the three-state

superhighway would have been constructed on the basis of "discrete segment" impact statements without the preparation and filing of the comprehensive corridor statement NEPA requires.

Conclusion

For the reasons stated the Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

Harvey D. Carter, Jr.
R. Paul Wickes
Haynes N. Johnson
Frederick Pope, Jr.
Robert L. Morris

Williams, Witten, Carter & Wickes
Of Counsel

July, 1975

APPENDIX A

1. Federal Highway Administration Policy and Procedure Memorandum (PPM) 90-1, 37 Fed. Reg. 21809-21816, in effect throughout the course of litigation in the lower courts, provides in part:

> 3. *Definitions* (as used in this memorandum)
>
> a. *Highway Section* - a substantial length of highway between logical termini (major cross-roads, population centers, major traffic generators, or similar major highway control elements) as normally included in a single location study. (See paragraph 6).

2. The Guidelines of the Council on Environmental Quality are published at 40 C.F.R. 1500 *et seq.* (1973). A relevant portion provides at Section 1500.6(d) (1) in part:

> Agencies should give careful attention to identifying and defining the purpose and scope of the action which would most appropriately serve as a subject of the statement. In many cases, broad program statements will be required in order to assess the environmental effects of a number of individual actions on a given geographical area (e.g. coal leases), or environmental impact that are generic or common to a series of agency actions (e.g. Maintenance or waste handling practices), or the overall impact of a large-scale program or chain of contemplated projects (e.g. major lengths of highway as opposed to small segments).

Hadwen, Inc. Legal Printers